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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
| IN RE ZAPPOS SECURITY BREACH | ) |                                      |
| LITIGATION                   | ) |                                      |
|                              | ) | Lead Case No. 2:12-cv-00182- RCJ-VCF |
| -----                        | ) |                                      |
| THIS DOCUMENT RELATES TO:    | ) | [Related to 3:12-cv-00072 and        |
|                              | ) | 2:12-cv-00232]                       |
| ALL ACTIONS                  | ) | (Class Action)                       |
|                              | ) |                                      |

**LEAD PLAINTIFFS PATTI HASNER, STEPHANIE PREIRA, ROBERT REE, SHARI SIMON AND KATHARINE VORHOFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY TO DEFENDANT ZAPPOS.COM, INC.'S MOTION TO COMPEL ARBITRATION AND STAY ACTION**

Lead Plaintiffs Patti Hasner, Stephanie Preira, Robert Ree, Shari Simon and Katharine Vorhoff respectfully request that this court grant leave to file a Sur-Reply to the Reply filed by Zappos.<sup>1</sup> Plaintiffs' Proposed Sur-Reply is attached as Exhibit 1 to the instant motion. Plaintiffs recognize that the ordinary course of events calls for a motion, an opposition, and a reply, and that sur-replies are out of the ordinary. However, the instant motion is necessary because Zappos raises a new argument in its Reply.

Specifically, and as set forth in more detail in Plaintiffs' Proposed Sur-Reply, Zappos argues for the first time in its Reply that Plaintiffs' assertion of contract claims requires Plaintiffs to submit to the Arbitration Clause contained in the Terms of Zappos.com, even though Zappos never presented the Terms to Plaintiffs, none of the Plaintiffs ever read the Terms, and the Arbitration Clause that Defendant requests this Court enforce is not contained in the actual or implied contracts underlying Plaintiffs' contract claims. In making this new argument, Zappos purports to distinguish this case from *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009) *aff'd*, 380 F. App'x 22 (2d Cir. 2010), by falsely indicating that the *Overstock* plaintiff did not bring a contract claim. In reality, *Overstock* is squarely on point; the *Overstock* plaintiff brought a contract claim, and the *Overstock* court nonetheless correctly refused to compel arbitration. *See id.* at 365-67.

Setting aside the infirmity of Zappos' new argument, which will be further addressed in Plaintiffs' Sur-Reply, it was improper to raise a new argument for the first time on Reply. *See, e.g., Pacquiao v. Mayweather*, No. 2:09-CV-2448-LRH-RJJ, 2010 WL 3271961 at \*1 (D. Nev. Aug. 13, 2010) ("[T]o the extent that a party raises a new argument or proffers new evidence and information in a reply brief, that argument or evidence is improper because the opposing party is deprived of an opportunity to respond.") (citing *Tovar v. United States Postal Service*, 3 F.3d 1271, 1273 n. 3 (9th Cir. 1993)); *Putzer v. Whorton*, No. 307-CV-00498-LRH RAM, 2008 WL 4167509 at \*11 n.1 (D. Nev.

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<sup>1</sup> Capitalized terms are used herein as defined in Plaintiffs' Opposition.

Sept. 3, 2008) (noting that arguments raised for the first time on reply were “improper[]” and declining to consider those arguments).<sup>2</sup>

In its motion to compel arbitration, Defendant seeks to quickly dispose of a complex multidistrict litigation seeking relief on behalf of 24 million putative class members. However, a motion of this magnitude should not be decided without full briefing on all issues.<sup>3</sup> *Accord Goodman v. Las Vegas Metro. Police Dept.*, 2:11-CV-1447-RCJ, 2012 WL 1681761 at \*2 n.3 (D. Nev. May 14, 2012) (Jones, J.) (noting that plaintiffs were given leave to file a sur-reply to address arguments raised by defendant for the first time in defendant’s reply brief supporting its motion to dismiss). Accordingly, Lead Plaintiffs respectfully request that this Court should grant leave to file the attached short Sur-reply, together with such other and further relief as the Court deems just and proper.

Dated: June 15, 2012  
Las Vegas, Nevada

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<sup>2</sup> As alternative relief, Plaintiffs respectfully request that the Court decline to consider the new argument in Defendant’s Reply. *Cf. Quan v. Computer Scis. Corp.*, 623 F.3d 870, 878 (9th Cir. 2010) (“We deem an argument waived if it is raised for the first time only in a reply brief.”).

<sup>3</sup> Plaintiffs requested that Defendant consent to the instant motion. Although Plaintiffs consented to multiple extensions of time for the filing of Defendant’s Reply, Defendant refused to consent to the instant motion.

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Motion for Leave to File a Sur-Reply to Defendant Zappos.com Inc.'s Motion To Compel Arbitration And Stay Action was served this 15th day of June, 2012, on the following via electronic service:

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